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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/722,701	11/25/2003	Oleg Kiselev	VRT0106U/S	7436
60429	7590	01/31/2011	EXAMINER	
CAMPBELL STEPHENSON LLP 11401 CENTURY OAKS TERRACE BLDG. H, SUITE 250 AUSTIN, TX 78758			DAYE, CHELCIEL	
ART UNIT	PAPER NUMBER			
	2161			
MAIL DATE	DELIVERY MODE			
01/31/2011	PAPER			

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte OLEG KISELEV

Appeal 2009-007197
Application 10/722,701
Technology Center 2100

Before ST. JOHN COURTENAY III, CAROLYN D. THOMAS, and
DEBRA K. STEPHENS, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the Examiner's final decision rejecting claims 1-21. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We Reverse.

Invention

Appellant's invention relates to "a method, system, and computer-readable medium to maintain consistent, up-to-date copies of primary data." (Spec. 38). According to one embodiment,

Primary data is maintained on a primary node, and point-in-time snapshots of the primary data are maintained on a secondary or remote node. Read operations can be directed to read some or all data from the remote node. When part of the data on the primary node becomes unavailable due to corruption, device failure, or communication failure, unavailable data can be read from the secondary node. When the determination is made that an unavailable portion of the data exists, a third data storage accessible by the first host can be created. Each subsequent change to the data in the first data storage can be written only to the third data storage. If an updated portion of the data is to be read, the updated portion can be read from the third data storage.

(*Id.*).

Claim 1 is illustrative:

1. A method comprising:

receiving a request to read a portion of data from first data storage, wherein the request is received by a receiving module of a first host, the first host can access the first data storage, and the first host cannot access second data storage;

requesting a requested portion of a copy of the data in the second data storage from a second host that can access the second data storage;

receiving the requested portion from the second host; and reading the portion of the data by reading the requested portion received from the second host, and

when a sub-portion of the portion of the data is not included in the requested portion received from the second host, reading the subportion from the first data storage.

(emphasis added).

The Examiner relies on the following prior art references as evidence of unpatentability:

DeKoning	US 6,691,245 B1	Feb. 10, 2004
Takeda	US 2004/0172509 A1	Sep. 2, 2004
Carlson	US 6,377,959 B1	Apr. 23, 2002

Appellant appeals the following rejections:

1. Claims 1-10 and 13-21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of DeKoning and Takeda.
2. Claims 11 and 12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of DeKoning, Takeda, and Carlson.

ISSUE

Based upon our review of the administrative record, we have determined that the following issue is dispositive in this appeal:

Did the Examiner err in finding that the combination of DeKoning and Takeda would have taught or suggested that a sub-portion of data not received from one data storage accessible via one host is instead read from another data storage accessible via another host within the meaning of independent claims 1, 13, 16, and 19? (See App. Br. 8).

FACTUAL FINDINGS (FF)

1. Takeda teaches that when a journal acquisition start command is received from the primary host, the journal data and metadata are stored in the journal volume after each write operation to the primary volume (PVOL). (Para. [0059]).
2. Takeda teaches that a journal copy request command initiates a journal transfer from the primary disk array to the secondary disk array. (Paras. [0061-62]).
3. Takeda teaches that the *initial data* stored in the primary volume is not transferred to the secondary disk array when the journal copy process is started. (Para. [0063]).
4. Takeda teaches that it is necessary to copy the *initial data* to the secondary volume (SVOL) from the PVOL using an initial copy process. (Para. [0063]).

ANALYSIS

We begin our analysis by noting that the issue before us on appeal involves the following limitations that are recited in commensurate form in each independent claim before us on appeal:

*receiving the requested portion from the second host; and
reading the portion of the data by reading the requested portion
received from the second host, and*

*when a sub-portion of the portion of the data is not included in
the requested portion received from the second host, reading the
subportion from the first data storage.*

(Claim 1)(emphasis added).

We observe that the Examiner acknowledges that the primary DeKoning reference fails to teach the disputed limitations. (Ans. 4-5). The Examiner looks to the teachings of Takeda at paragraphs 0061 to 0065 to cure the admitted deficiencies of DeKoning. (Ans. 5, 11-12).

As pointed out by Appellant: “the Examiner has equated the secondary host of Takeda with the first host of claim 1.” (App. Br. 9, ¶ 2).

We particularly note that the Examiner (Ans. 12) reads the claimed “sub-portion of the portion of the data [] not included in the requested portion received from the second host” (claim 1) on Takeda’s “initial data” stored on the primary volume that is not transferred to the secondary disk array when the journal copy process is started. (*See* FF 3). Takeda teaches that it is necessary to copy this initial data to the secondary volume (SVOL) from the primary volume (PVOL) using an initial copy process. (FF 4).

Takeda also teaches that a journal copy request command initiates a journal transfer from the primary disk array to the secondary disk array. (FF 2). Takeda further teaches that when a journal acquisition start command is received from the primary host, the journal data and metadata are stored in the journal volume after each write operation to the primary volume (PVOL). (FF 1).

To summarize, the Examiner reads the “requested portion received from the second host” (claim 1) on Takeda’s journal data and metadata that are copied responsive to the journal acquisition start command. (Ans. 11-12). The Examiner (Ans. 12) reads the claimed “sub-portion of the portion of the data [] not included in the requested portion received from the second host” (claim 1) on Takeda’s “initial data” stored on the primary volume that is not transferred to the secondary disk array when the journal copy process is started. (FF 3). (Ans. 11-12).

On this record, we find the evidence supports Appellant’s contention that “[s]ince the primary host of Takeda is being equated with the second host of claim 1, this portion of Takeda, at best, teaches an action that would be equivalent to receiving both the requested portion and the sub-portion of the data from the second host of claim 1” (App. Br. 9, ¶ 3).

Therefore, we agree with Appellant that the Examiner’s proffered combination of DeKoning and Takeda does not teach nor fairly suggest “when a sub-portion of the portion of the data is not included in the requested portion received from the second host, reading the sub-portion from the first data storage.” (Claim 1)(emphasis added). *See* App. Br. 9,

¶ 3. We note that the aforementioned limitations argued by Appellant are recited in commensurate form in each independent claim before us on appeal.

Therefore, for essentially the same reasons argued by Appellant, and for the reasons further discussed above, we reverse the Examiner's obviousness rejection for each independent claim on appeal. Because we have reversed the Examiner's rejection of each independent claim on appeal, we also reverse the Examiner's obviousness rejections for each dependent claim. Regarding the second § 103 rejection of claims 11 and 12, the Examiner has not shown, and we do not find that the tertiary Carlson reference cures the aforementioned deficiencies of DeKoning and Takeda.

CONCLUSION

On this record, the Examiner's legal conclusion of obviousness is not supported by the evidence regarding the specific limitations disputed by Appellant that we have addressed above.

DECISION

We reverse the Examiner's § 103 rejections of claims 1-21.

ORDER

REVERSED

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CAMPBELL STEPHENSON LLP
11401 CENTURY OAKS TERRACE
BLDG. H, SUITE 250
AUSTIN, TX 78758